In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-902

DENNIS EVANS INGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his vessel by Customs officials, conducted without probable cause to believe the vessel contained contraband, violated his Fourth Amendment rights.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of illegally importing 4,000 pounds of marijuana into the United States (count 2), in violation of 21 U.S.C. 952(a); of conspiring to commit that offense (count 1), in violation of 21 U.S.C. 963; and of possessing marijuana with the intent to distribute it (count 3), in violation of 18 U.S.C. 841(a)(1) (Pet. App. 1-8).[1] Peti-

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[1]Also named in all three counts of the indictment were Stephen Thomas McCarthy and Keith Meiggs. Both entered guilty pleas prior to petitioner's trial, Meiggs to count 1, and McCarthy to counts 1 and 3.

tioner was sentenced under 18 U.S.C. 4208(a)(2) to concurrent terms of five years' imprisonment on count 1 and two years' imprisonment on counts 2 and 3, to be followed by a special parole term of two years on each count (Pet. App. 7). The court of appeals affirmed (Pet. App. 9-20) in an opinion reported at 502 F.2d 1287.

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. 13-15). On December 13, 1971, petitioner, using the alias Dennis Kaufman, purchased the 42-foot vessel in question, M/V Nurmi, for $55,000 in cash. Customs Agent William Norsworthy testified that on January 8, 1972, as a result of certain information concerning M/V Nurmi that he had received, a search was undertaken to determine the whereabouts of this vessel. It was discovered on January 11, docked behind the premises at 240 Golden Beach Drive, Golden Beach, Florida—premises leased by petitioner's co-defendant, McCarthy, on January 1, 1972, for a period of four months (Pet. App. 13-14). On January 25 and 26, the vessel was sighted at Cartagena, Columbia, with petitioner aboard.

On February 6, 1972, the vessel was sighted several times—first at 1:00 p.m. near Cat Cay in Bahamian waters; an hour and a half later, about 15 miles west of Bimini, heading toward the Florida coast; at 7:25 p.m., entering inland waters from the Atlantic Ocean; and then, twenty minutes later, traveling up an intercoastal waterway. Finally, at 8:00 p.m., it was observed docking at the Golden Beach Drive premises, and petitioner was seen leaving the vessel (Pet. App. 14).

Customs agents then observed co-defendant McCarthy open a garage door, at which time they approached him and identified themselves. At that point, petitioner and co-defendant Meiggs ran out of the house and were apprehended in the backyard. At approximately 8:05 p.m., McCarthy took the agents on board the M/V Nurmi, where they detected the odor of marijuana and subsequently discovered 4,000 pounds of marijuana in burlap bags in the after cabin of the vessel (Pet. App. 14-15).

1. Petitioner contends that because his vessel was not searched as soon as it crossed the international boundary into the United States and was not under constant surveillance from that time until the time it docked, the search conducted by Customs agents was illegal in the absence of an authorizing warrant or probable cause to justify a search for contraband. However, it is settled that in carrying out their duties to ascertain if merchandise being brought into this country is subject to duty or has been unlawfully imported, Customs agents are authorized to enter vessels or other conveyances at our international boundaries and conduct searches without warrants, "whether or not there be any suspicion of illegality directed to the particular person or thing to be searched." *United States* v. *Odland*, 502 F.2d 148, 151 (C.A. 7), certiorari denied, December 23, 1974, No. 74-348. See also *Boyd* v. *United States*, 116 U.S. 616, 623; *Carroll* v. *United States*, 267 U.S. 132, 153-154; *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 288 (dissenting opinion of Mr. Justice White) ("[T]he legality of search-

ing, without warrant and without probable cause, individuals and conveyances seeking to enter the country has been recognized by Congress and the courts since the very beginning.").[2]

Contrary to petitioner's assertion, the Customs search in this case did not become illegal simply because the search was conducted in inland waters rather than at the immediate international boundary. In *Alexander* v. *United States*, 362 F.2d 379, 382 (C.A. 9), the court stated the rule governing Customs searches that are not conducted in the immediate vicinity of the international border:

> * * * [T]he legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a "border search."

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[2]Congress has expressly authorized Customs agents to board vessels for such purpose in 19 U.S.C. 1581, which provides in pertinent part:

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703 to 1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

The evidence shows that petitioner's vessel entered the United States from international waters sometime between 2:30 p.m. and 7:25 p.m. on February 6, 1972. Moreover, based upon the surveillance of the vessel from 7:25 p.m. until the search forty minutes later, the trial judge and jury could, and obviously did, conclude with "reasonable certainty" that the marijuana was on board the vessel at the time it crossed our international boundary. There is no cause for further review in this Court of that factual determination. As the court of appeals here properly noted (Pet. App. 17-18):

> * * * [T]here is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel in relation to our International borders. Congress has long recognized this and the law has to—and does—reckon with these differences often very specifically.
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> There is no hard and fast rule that there must be an actual visual sighting of an international boundary crossing. In *United States* v. *Hill*, 5 Cir., 1970, 430 F.2d 129, a case whose facts are strikingly similar to the facts here, we rejected the like contention that the vessel was never actually seen crossing the international boundary three miles out at sea and thus the seized contraband should have been held inadmissible. Of "border searches" we wrote—
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> > "The extraordinary deference accorded this unique category of searches is based on a recognition of the difficulty involved in effectively policing our national boundaries. The facts of the present case dramatically illustrate the burden we would be placing on the officers charged with

this responsibility, were we to accept appellant's position."

United States v. *Hill*, *supra* at 131. [Footnote omitted.][3]

2. Petitioner's reliance (Pet. 4-7) on *Almeida-Sanchez* v. *United States*, *supra*, and its progeny is misplaced. For one thing, in *Almeida-Sanchez* the Court found that "there was no assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of an offense" (413 U.S. at 271-272). As demonstrated above, the facts here, including the surveillance of the vessel by the Customs agents, clearly showed that it had crossed the border from international to interior waters and thus was "within the proper scope of official scrutiny." See Pet. App. 16. More importantly, *Almeida-Sanchez* and the follow-up cases presently before the Court concern the validity of the Border Patrol's traffic checking procedures carried out in the interior of the United States to detect the presence of illegal aliens in this country. Nothing in those cases is pertinent to the very different factual context presented here or to resolution of the entirely distinct issue raised by petitioner.

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[3]While petitioner's vessel was not under surveillance as closely as was the vehicle involved in *Alexander* v. *United States*, *supra*, the court in that case noted that the *manner* as well as the extent of surveillance was an important factor in determining the validity of the search. As the court below noted, "[t]he law * * * allows for common sense" (Pet. App. 18), and common sense dictates that a different manner of surveillance is required in a situation involving a vessel on the high seas or in inland waters, from that involved when dealing with vehicles on the highway. Perhaps use of helicopters or a trailing vessel would have enabled the Customs agents to maintain petitioner's vessel under constant surveillance, but such a procedure would hardly lend itself to the apprehension of those engaged in smuggling activities, since it would put them on notice that their every move was being watched.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.